PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 46

THE UNITED STATES, PETITIONER

vs.

THE CAMBRIDGE LOAN AND BUILDING COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JANUARY 14, 1926
CERTIORARI GRANTED APRIL 5, 1926

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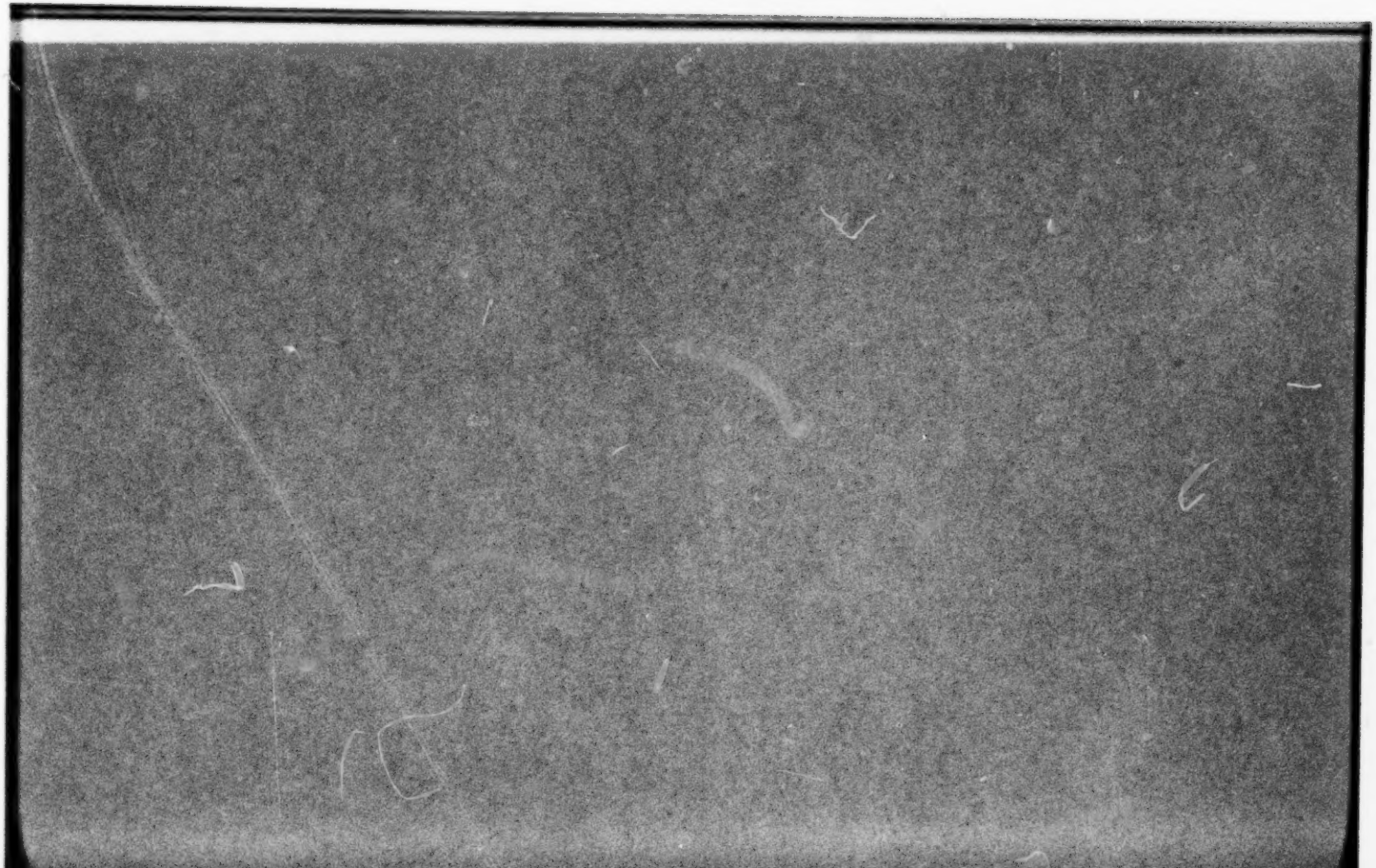

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No. 700

THE UNITED STATES, PETITIONER

vs.

THE CAMBRIDGE LOAN AND BUILDING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Petition for writ of certiorari	1	1
Record from Court of Claims	10	5
Petition	[illegible]	5
General traverse	15	7
Argument and submission	15	7
Special findings of fact	16	8
Conclusion of law	20	11
Opinion, Moss, J.	20	11
Judgment	27	18
Proceedings after judgment	27	19
Clerk's certificate [omitted in printing]	28	19
Order allowing certiorari		19

1 In the Supreme Court of the United States

October term, 1927

No. ——

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE CAMBRIDGE LOAN AND BUILDING COMPANY (A CORPORATION)

Petition for writ of certiorari to the Court of Claims

The Solicitor General on behalf of the United States of America prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause in favor of respondent in the sum of $17,174.67 on June 6, 1927. The Government filed a motion for new trial on August 5, 1927, which was overruled by the court on October 17, 1927.

Statement

2 The question in this case is whether respondent is entitled to exemption, as a building and loan association, from income taxes under revenue acts of 1918 and 1921. Taxes for the years 1918 to 1923, inclusive, are involved. The years 1918, 1919, and 1920 are controlled by the revenue act of 1918. Under section 231 (4) of said act (40 Stat. 1076), exemption is granted to "domestic building and loan associations and cooperative banks without capital stock organized and operated for mutual purposes and without profit." The taxes for the years 1921, 1922, and 1923 are controlled by section 231 (4) of the revenue act of 1921 (42 Stat. 253), which provides that exemption should be granted to "domestic building and loan associations substantially all the business of which is confined to making loans to members."

The substance and effect of the holding of the Court of Claims is that under either act a building and loan association, recognized as such by the laws of the State under which it exists, is entitled to exemption from such Federal taxes merely because defined as a building and loan association by State law. The Government contends that under both acts a building and loan association to be entitled to exemption must conduct its business as a building and loan association in fact and not merely be designated as such under the laws of the State of its origin. The Government further contends that a building and loan association accepting large sums of money from nonmember depositors regardless of the borrowing needs of its members for the purpose of lending the same to nonmembers is in fact conducting a savings-bank business and is not entitled

3 to exemption as a building and loan association. The Government further contends that, under the 1921 act, substantially

all of the business of a building and loan association must be confined to making loans to members, and that in this case the respondent, during the years 1921, 1922, and 1923, which are controlled by the 1921 act, did a very large and substantial part of its business with nonmembers.

The findings by the Court of Claims show that the respondent was an Ohio corporation, organized under the law of that State authorizing the creation of building and loan associations; that it made its reports to and was inspected by the superintendent of the building and loan associations of the State of Ohio and invested its funds in the manner prescribed and permitted under the laws of the State of Ohio for the investment of funds of building and loan associations, reporting its investments annually to the State authorities. During the period involved the net profits of the respondent, except such as were set aside as a reserve under the State laws and retained as undivided profits, were distributed in dividends to members. The money raised by respondent during the years involved was principally from payments on stock, from deposits by nonmembers, and from interest on money temporarily deposited by it in a bank or loaned to other building and loan associations. Deposits by nonmembers were evidenced by certificates of deposit, or by pass books, and could be withdrawn upon notice, and the respondent paid interest thereon.

4 The respondent's assets and liabilities at the end of the calendar years 1918 to 1923, inclusive, are set out in the findings, and an examination thereof (Finding VII) shows in the asset columns loans on mortgage security in very substantial amounts; in all cases over 75% of the total assets of the corporation, and deposits in other building and loan associations of substantial amounts, in most cases equaling 10% of the total assets of the corporation.

In the liabilities item 6 shows deposits (from nonmembers) and accrued interest for all of the years involved. This is considerably over 50% of the total liabilities, and for the years 1921, 1922, and 1923 a successively increasing proportion.

Finding VIII shows the loans made to members and to nonmembers during each year, and an examination of this finding clearly indicates that a large part of the business of the respondent, whether considered from the standpoint of the number of borrowers or the total amount borrowed, was done with nonmembers during the years 1918, 1919, 1920, 1921, and 1922. In 1923 both the number and the amount loaned to nonmembers decreased. The Court of Claims omitted from its findings of fact a statement of mortgages purchased in substantial amounts.

The Court of Claims was requested to find these facts concerning the mortgages purchased, and such facts were based upon a stipulation of the parties before the court. The court failed to

5 make such finding. The Government again requested that such finding be made on a motion for a new trial, and the

court overruled such suggestion without comment. Further than that, as to the table concerning the year 1923, in which a great decrease in the number of nonmember borrowers is shown, a stipulation of facts before the court shows that respondent accepted large deposits from nonmembers and the evidence shows that this was done without reference to and regardless of the borrowing needs of its members. This was requested to be found as a fact, but the court failed to make such finding, and although same was requested on a motion for new trial, such motion was overruled without comment.

The Government also requested a finding as to the number of stockholders of the respondent and the number of depositors, based upon a stipulation of facts, which statement is as follows:

	1918	1919	1920	1921	1922	1923
Stockholders	1,250	1,030	1,040	1,030	1,172	901
Depositors	1,550	1,922	2,085	2,206	2,450	3,025

As to this the Court of Claims again failed to make a finding and ignored a renewed request for such finding in the motion for new trial. The Government also requested a finding of fact based upon an agreed statement of facts showing the dividends paid on run-
6 ning stock, paid-up stock, and loan stock for the various years concerned. The Court of Claims failed to make this finding and ignored a renewed request in the motion for new trial.

In explanation of the decrease in loans to nonmembers during the year 1923, the Government offered evidence which was undisputed to the effect that respondent made loans to persons who subsequently took out nominal subscriptions of one or two shares to qualify them as members, not taking the usual number of shares to equal the amount of their loans, and it was expressly testified that it was conceived this would reduce the tax liability. A finding was requested upon this, but the court made none and again ignored a renewed request in the Government's motion for new trial.

In short, the Court of Claims has failed to make a number of findings on matters fortifying the position of the United States and on which the facts were stipulated or undisputed.

While we believe that even upon the findings as made, the decision by the Court of Claims is improper and in error, it is the purpose and intention of the Government, if the writ of certiorari is granted, to make a motion for remand to the Court of Claims for findings as to these and other additional facts which the Government submits have an important bearing upon the proper determination of this case. We see no justification whatever for the failure of the Court of Claims to give the party against whom its decision went the benefit of findings on matters bearing directly on its case.

7 Assignment of errors

(1) The Court of Claims erred in rendering a judgment in favor of respondent.

(2) The Court of Claims erred in holding that the respondent was a building and loan association entitled to exemption.

(3) The Court of Claims erred in its construction and interpretation of section 231(4) of the revenue act of 1918.

(4) The Court of Claims erred in construing section 231(4) of the revenue act of 1921 to exempt the respondent although a substantial part of its business was done with nonmembers.

Reasons for granting writ

I. The decision by the Court of Claims involves a principle which affects the income taxes of a large number of so-called building and loan associations which may yet become the subject of litigation or administrative adjustment. It is not possible to segregate the companies in respect to the two acts of 1918 and 1921 by including the so-called building and loan associations which are affected under both acts. There are 1,361 so-called building and loan associations which have been taxed, and the amount of taxes collected is reported to be undoubtedly in excess of twenty-six million dollars and probably a much larger sum, a considerable part of which may have
8 to be refunded if the decision in this case is allowed to stand.

The applicable provisions of the 1921 act here involved have been reenacted in all the later revenue acts, and the question here presented is a live one under the revenue act now in force.

II. The decision of the Court of Claims is not clearly in harmony with the principles laid down in the case of Lilley Building and Loan Company v. Miller, 280 Fed. 143, affirmed, 285 Fed. 1020, certiorari denied, 262 U. S. 754, or with the decision of the Board of Tax Appeals in Johnstown Building and Loan Association, 6 B. T. A. 463.

For these reasons it is respectfully submitted that the writ of certiorari be granted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

JANUARY, 1928.

10 **In the Court of Claims**

THE CAMBRIDGE LOAN AND BUILDING COMPANY (a corporation) vs. THE UNITED STATES	No. D-1083

1. Petition

Filed December 22, 1924

To the CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF CLAIMS:

Your petitioner, the Cambridge Loan and Building Company, a corporation, respectfully represents to your honours:

I

That it is a corporation created under and existing at all times herein referred to by virtue of the laws of the State of Ohio, one of the United States of America, having its principal place of business in the said State, and at all times herein referred to it was, within the purview and meaning of the laws of the said State of Ohio, a building and loan association and conducted, carried on, and engaged in only such business as is contemplated under the laws of the said State to be carried on, conducted, or engaged in by a building and loan association.

II

The revenue act of 1918, which is the authority for the assessment of income and excess profits taxes for the calendar years 1918,
11 1919, and 1920, provides at section 231 thereof that there shall be exempt from taxation, under Title II thereof, denominated "Income tax," domestic building and loan associations; and further provides under section 304 of said act that there shall be exempt from taxation, under Title III thereof, denominated "War profits and excess profits tax," the corporations enumerated in section 231 of said act to the extent that such corporations are exempt from income tax under Title II of said act; and further provides that when used in that act the term "domestic," when applied to a corporation, means "created or organized in the United States," and that the term "United States," when used in a geographical sense, includes only the "States, the Territories of Alaska and Hawaii, and the District of Columbia."

III

Your petitioner further represents that the revenue act of 1921, which is the authority for the assessment of income taxes for the calendar years 1921, 1922, and 1923, provides at section 231 thereof that there shall be exempt from taxation under Title II of said act, which is denominated "Income tax," domestic building and loan associations substantially all the business of which is confined to making loans to members, and also provides that the term "domestic," when applied to a corporation, means "created or organized in the United States," and that the term "United States," when used in a geographical sense, includes the "States, the Territories of Alaska and Hawaii, and the District of Columbia."

IV

Your petitioner further represents that during the calendar
12 years 1921, 1922, and 1923 substantially all of its business was confined to making loans to its members.

V

Notwithstanding the facts hereinbefore set forth, all of which were at all times well known to the Commissioner of Internal Revenue, and notwithstanding the provisions of law hereinbefore referred to, the said commissioner did on, to wit, the 18th day of September, 1924, assess against your petitioner, upon assumed authority under the revenue act of 1918, the following income and excess profits taxes for the calendar years 1918, 1919, and 1920; for the calendar year 1918, $1,963.33 and $265.05 interest; for the calendar year 1919, $1,552.80 and $199.55 interest; and for the calendar year 1920, $1,879.75 and $253.76 interest; and the said commissioner did further, upon assumed authority under the revenue act of 1921, assess against your petitioner income taxes for the calendar years 1921, 1922, and 1923, as follows: For the year 1921, $2,224.91 and $309.84 interest; for the year 1922, $1,688.18; and for the year 1923, $4,377.43.

VI

Thereafter the collector of internal revenue for the 18th district of Ohio did make formal demand upon your petitioner for the payment of said taxes and did threaten the imposition of penalties and interest for failure to make payment within the time required by his demand, against all of which said assessment and collection of taxes your petitioner did duly protest, but in order to avoid the imposition of such penalties and to avoid the seizure and distraint and sale of its property by the said collector in satisfaction of such taxes
13 and penalties your petitioner did on, to wit, the 18th day of September, 1924, under specific protest, pay the said taxes to

the said collector, all of which were subsequently covered in the Treasury of the United States.

Thereafter, on, to wit, the 25th day of September, 1924, your petitioner did duly appeal to the said commissioner by filing with him its claim for refund of the whole amount of said taxes, but the said commissioner did on, to wit, the 26th day of November, 1924, reject the said claim and refused thereby to refund the said taxes to your petitioner except $922.05 of the taxes assessed for the calendar year 1922 and $1,094.36 of the taxes assessed for the calendar year 1923, leaving as the aggregate amount rejected the sum of $14,767.56.

VII

Your petitioner further avers that it has not in any way aided, abetted, or given encouragement to rebellion against the United States; that the facts set forth herein are true; that it has never assigned the said claim nor any part thereof, but has always been and is now the sole owner thereof, and that it is justly entitled to recover of and from the United States the sum of $14,767.56, together with interest thereon at the rate of six per centum per annum from the 18th day of September, 1924.

Wherefore, your petitioner prays judgment against the United States for the sum of $14,767.56 with interest as aforesaid.

THE CAMBRIDGE LOAN AND BUILDING COMPANY,
By L. L. HAMBY, *Its Attorney in Fact.*

[*Duly sworn to by L. L. Hamby; jurat omitted in printing.*]

15 *II. General traverse*

Jan. 27, 1925

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises having been entered on the part of the defendant, a general traverse is entered as provided by rule 34.

III. Argument and submission

On April 6, 1927, this case was argued and submitted on merits by Mr. L. L. Hamby for the plaintiff and by Mr. Alexander H. McCormick for the defendant.

16 *IV. Special findings of fact, conclusion of law, and opinion of the court by Moss, J.*

June 6, 1927

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Special findings of fact

I

The plaintiff during the calendar years 1918 to 1923, inclusive, was a corporation organized in the year 1885 under and by virtue of the laws of the State of Ohio for the purpose of raising money to be loaned to its members and others and for such other purposes as were authorized by law; was authorized to issue capital stock not in excess of $1,500,000; and had its place of business in the city of Cambridge in said State. The par value of each share was $50.

II

Ever since the creation of the office of superintendent of building and loan associations under the laws of the State of Ohio in the year 1891 the plaintiff has annually filed its report to the said superintendent as a building and loan association organized, created, and doing business as such under the laws of the State of Ohio, and the plaintiff was, as such building and loan association, annually inspected by the said superintendent in the course of his official duties.

III

With the exception of an investment of $5,000 in hotel bonds, which was disapproved by the department of building and loan associations of the State of Ohio and afterwards disposed of, the plaintiff, during the calendar years 1918 to 1923, inclusive, invested its funds in the manner prescribed and permitted under the laws of the State of Ohio for the investment of funds of building and loan associations, reported its said investments annually to the superintendent of building and loan associations of the said State, and
17 received a report each year from the said department upon the conduct of its business.

IV

Section 1 of Article V of plaintiff's constitution provided as follows:

"Anyone, upon subscribing for, or in any manner becoming entitled to, or the owner of any part of the capital stock of this company shall be deemed a member thereof and a stockholder therein to the extent of the extent of the balance of his credits of record on account of said stock."

V

During the calendar year 1918 to 1923, inclusive, the net profits of the plaintiff, except that part set aside as a reserve fund under the laws of the State of Ohio and that part retained as undivided profits, were distributed semiannually in dividends at the rate of 5.7% for the year to the members of the plaintiff company only and at the said rate to all members of all classes.

VI

The money raised by the plaintiff during the calendar years 1918 to 1923, inclusive, for the purposes of its incorporation was principally from payments on stock, from deposits by nonmembers, and from interest on moneys temporarily deposited by it in bank or loaned to building and loan associations, and the extent of all such transactions was reported to the superintendent of building and loan associations of the State of Ohio in the aforesaid annual reports.

Deposits by nonmembers were evidenced by certificates of deposit or by pass books, could be withdrawn upon notice, and plaintiff paid interest thereon, on sums deposited less than six months, 3%; more than six months and less than a year, 4%; and a year, 5%.

VII

The plaintiff's assets and liabilities at the end of each calendar year, 1918 to 1923, inclusive, were as follows:

ASSETS

	1918	1919	1920	1921	1922	1923
1 Cash on hand	$55,868.16	$28,612.70	$52,660.66	$34,955.91	$43,271.95	$39,109.69
2 Loans on mortgage security	737,130.64	862,834.40	1,111,127.09	1,254,904.98	1,289,535.98	1,522,738.17
3 Loans on stock certificates or pass-book security	8,018.80	8,698.22	9,842.50	8,896.75	16,672.24	18,042.25
4 Loans on other security	17,978.00	34,020.00	27,346.42	27,614.75	35,655.25	26,760.60
5 Furniture and fixtures	200.00	265.00				500.00
6 Real estate sold on contract	750.00	750.00	750.00	750.00		
7 Real estate—office building	22,500.00	22,500.00	22,500.00	22,500.00	22,500.00	22,500.00
8 Due from borrowers for insurance and taxes	230.12	309.14	207.19	188.34	734.38	64.14
9 Bonds	16,497.50	10,762.98	25,767.80	24,279.54	5,000.00	
10 Deposits in other building and loan associations	98,800.00	147,000.00	95,000.00	55,500.00	94,000.00	181,500.00
11 Deposits in other financial institutions					10,000.00	15,000.00
Total	957,684.89	1,119,732.50	1,345,470.26	1,429,000.27	1,527,369.78	1,818,210.85

[1] Discrepancy of 40 cents not explained.

LIABILITIES

	1918	1919	1920	1921	1922	1923
1 Running stock and dividends	$219,842.85	$207,326.07	$196,473.26	$211,031.99	$158,858.99	$112,994.34
2 Loan stock and dividends	39,304.85	38,703.94	63,245.02	68,839.52	61,216.81	42,976.41
3 Credits on mortgage loans	107,785.64	104,018.30	101,511.68	161,940.61	197,584.15	231,057.22
4 Credits on real estate sold on contract	132.89	198.53	259.50	317.12		
5 Paid-up stock and dividends	45,756.00	60,711.95	92,139.00	95,235.77	111,188.55	181,240.64
6 Deposits and accrued interest	340,698.30	464,371.72	510,451.86	609,981.31	932,918.29	1,142,796.73
7 Reserve fund	14,310.00	15,760.00	18,009.75	21,702.36	23,302.36	25,182.36
8 Undivided profit fund	14,711.82	14,951.62	14,951.62	14,951.62	20,161.07	29,659.67
9 Contingent profit on real estate sold on contract	50.00	50.00	50.00	50.00		
10 Due borrowers on unfinished buildings	3,344.49	8,630.39	8,319.95	6,950.00	2,150.00	12,378.48
11 Deposits from other building and loan associations		5,000.00				
Total	957,684.89	1,119,732.50	1,345,470.26	1,429,000.27	1,527,370.18	1,818,210.85

[1] Discrepancy of 40 cents not explained.

VIII

During the years in question the plaintiff made loans to members and to nonmembers in number and amount and on security as follows:

Security	Borrowers			
	Members		Nonmembers	
	Number	Amount	Number	Amount
1919				
Bonds	53	$17,610.00	24	$30,124.00
Real estate	3	9,700.00		
Farms	6	2,825.00	10	12,000.00
Business			4	40,300.00
Chattels			1	7,500.00
Collateral	4	2,115.00	20	2,505.00
Total	66	32,250.00	59	96,629.00
1920				
Bonds	133	170,430.00	36	62,925.00
Real estate	7	12,300.00	4	4,700.00
Farms	10	9,600.00	4	11,300.00
Business			5	22,100.00
Collateral	11	1,655.00	44	30,053.70
Total	159	194,035.00	93	131,439.70
1921				
Bonds	133	164,171.43	46	104,125.00
Real estate	3	1,940.00	4	4,700.00
Farms	5	6,850.00	10	24,300.00
Business	5	12,000.00	10	94,300.00
Chattels	1	700.00		
Collateral	9	3,190.00	22	14,642.42
Total	156	190,750.43	102	232,472.42
1922				
Bonds	149	182,291.00	19	69,650.00
Real estate	9	4,700.00		
Farms	13	14,850.00	1	4,000.00
Business	9	32,500.00	9	127,100.00
Chattels			1	13,500.00
Apartments	1	5,000.00		
Collateral	9	15,750.00	27	8,391.00
Total	191	256,170.00	57	222,641.00
1923				
Bonds	117	161,105.21	4	10,000.00
Real estate	3	1,512.00		
Farms	12	12,700.00		
Business	3	3,900.00	1	94,000.00
Chattels	1	5,000.00		
Collateral	7	1,675.00	20	19,530.00
Total	143	209,992.21	25	123,530.00
1924				
Bonds	220	355,500.00	1	700.00
Real estate	13	14,900.00		
Farms	15	26,200.00		
Business	9	150,000.00		
Apartments	1	40,000.00		
Collateral	10	9,911.00	28	9,843.00
Total	273	606,111.00	29	10,543.00
1919-1925				
Mortgage	915	1,473,900.28	197	706,396.00
Collateral	43	35,799.00	146	78,014.13
Total	958	1,499,294.28	343	784,210.13

IX

At no time during the period in question did plaintiff lend money to a nonmember in preference to a member.

X

On September 18, 1924, the Commissioner of Internal Revenue assessed against the plaintiff income and excess-profits taxes for the calendar year 1918, $1,963.33 and $265.05 interest; for the calendar year 1919, $1,552.20 and $199.55 interest; for the calendar year 1920, $1,879.75 and $253.76 interest; for the calendar year 1921, $2,294.91 and $309.81 interest; for the calendar year 1922, $3,688.18; and for the calendar year 1923, $4,377.43. The collector of internal revenue for the 11th district of Ohio made formal demand upon the plaintiff for the payment of the said taxes and interest, against which the plaintiff protested. In order to avoid the imposition of penalties and the seizure, distraint, and sale of its property in satisfaction of such taxes and penalties, the plaintiff, on the 18th of September, 1924, under specific protest, paid the said taxes to the said collector and they were thereafter covered into the Treasury of the United States.

XI

On September 25, 1924, the plaintiff appealed to the Commissioner of Internal Revenue and filed with him a claim for refund of the whole amount of the aforesaid taxes and interest. On November 26, 1924, the commissioner rejected the said claim except as to $922.05 of the taxes assessed and paid for the year 1922 and $1,094.36 of the taxes assessed and paid for 1923, for which he issued certificates of overassessment, leaving as the aggregate amount rejected the sum of $14,767.56, which is still retained in the Treasury of the United States.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiff is entitled to recover the sum of $14,767.56, with interest thereon from September 18, 1924, to date of judgment, amounting to $2,407.11, an aggregate of $17,174.67.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of seventeen thousand one hundred and seventy four dollars and sixty-seven cents ($17,174.67).

Opinion

Moss, Judge, delivered the opinion of the court:

This is an action by plaintiff, the Cambridge Loan and Building Company, for the recovery of the sum of $14,767.56, which it alleges

was illegally collected by the Government as income tax for the years 1918 to 1923, inclusive. Said taxes were paid under protest, and a claim for refund was duly filed with the Commissioner of Internal Revenue and was rejected on the 26th day of November, 1924.

The question for determination is whether or not plaintiff is entitled to exemption from taxes under the provisions of the revenue acts of 1918 and 1921, respectively.

Under section 231 (4) of the revenue act of 1918, 40 Stat. 1057, exemption is granted to "domestic building and loan associations and cooperative banks without capital stock organized and operated for mutual purposes and without profit."

Under section 231 (4) of the revenue act of 1921, 42 Stat. 253, exemption is granted to "domestic building and loan associations, substantially all the business of which is confined to making loans to members."

The act of 1918 is applicable to the years 1918, 1919, 1920, and from January 1 to November 23, 1921; and the act of 1921 is applicable to the period between November 23 and December 31, 1921, when the act was passed, and to the years 1922 and 1923.

Plaintiff company was organized and incorporated under the laws of the State of Ohio in 1885, and has continuously since that time been engaged in the business of a building and loan association. Its capital stock for the years 1918 to 1923, inclusive, was $1,500,000 of the par value of $50 a share.

Under the provisions of its constitution and by-laws plaintiff company was organized "for the purpose of raising money to be loaned to its members and others, and for such other purposes as are authorized by law."

It is contended by the Government that the method pursued by plaintiff in the transaction of its business was of such a character as to destroy the essential requirements of building and loan associations as contemplated by the taxing statutes involved herein.

21 In an effort to ascertain the intention of Congress in the enactment of the exemption provisions of the acts of 1918 and 1919 it is deemed important to briefly review the history of legislation on this question, as well as the current administration of the various statutes by the Internal Revenue Bureau.

The revenue act of 1909 provided that the special excise tax therein contemplated should not apply to "domestic building and loan associations organized and operated exclusively for the mutual benefit of their members." Under this act certain litigation arose, resulting in each case in decisions favorable to the taxpayer. The Internal Revenue Bureau accepted the decisions of the courts and refunded all taxes which had been collected under this act, except those taxes which had been barred by the statute of limitations. In February, 1917, Congress authorized and directed the refund of all such taxes, referring to same as taxes "illegally collected from said associations under the excise tax act of August 5, 1909."

By the act of October 3, 1913, the restrictive term "exclusively" was omitted, the act merely providing that the tax therein imposed should not apply to "domestic building and loan associations." Under this act no building and loan association was subjected to the payment of tax, nor were they required to file a tax return.

By the act of September 8, 1916, Congress provided that "there shall not be taxed under this title any income received by * * * Fourth. Domestic building and loan associations and cooperative banks without capital stock organized and operated for mutual purposes and without profit." No building and loan association was subjected to the payment of income tax under this statute, nor was any tax return required to be filed.

The 1918 act, section 231 (4) contained the same language as that employed in the 1916 act, and under this statute no income tax was assessed or collected, nor was any return required.

The act of 1921, passed November 23 of that year, modified the 1916 and 1918 acts in so far as it relates to building and loan associations in only one particular. It provided for the exemption of those associations "substantially all the business of which is confined to making loans to members."

It will be noted, therefore, that under none of the acts, except the act of 1909, was any income tax required to be paid by any building and loan association, and that the taxes paid under the 1909 act were refunded.

A proper consideration of this legislation, together with the interpretation given to it by the Internal Revenue Bureau, covering a period of many years and involving five separate legislative enactments; the elimination of the harsh provisions of the earlier act of 1909; and the refund of the taxes collected under the 1909 act would seem to indicate clearly a fixed purpose and intention on the part of Congress to exempt from taxation building and loan associations conforming in essential respects to the primary business of such associations. It was not until the early part of the year 1922, after the effective date of the act of 1921, that the Commissioner of Internal Revenue undertook to subject any building and loan association to the payment of income tax.

The Government chiefly relies in this case upon the decisions in the case of Ackline v. Peoples Savings Association, 293 Fed. 392, 22 and in the case of Lilley Building and Loan Company v. Miller, 280 Fed. 145. The opinion in the former case announced certain general principles governing the operation of building and loan associations, which are usually accepted as sound and correct, but the sole question at issue in that case was whether or not the Commissioner of Internal Revenue had authority to define the qualifications for membership, the court holding that he had no such power. The purpose of citing this case in support of the Government's contention in the case now being considered is not clear.

Under the facts in the Lilley case the court held that the association was not a true building and loan association, but was in effect

a savings bank. This action involved the years 1918, 1919, and 1920, and is therefore governed by the 1918 act. Conspicuous among the facts as they appear in the opinion are the following: Receipts of deposits from nonmembers constituted the bulk of its business. If received time deposits for which it issued certificates bearing interest at the rate of 5 per cent. The year 1920, considered as typical of the period of time involved, shows running stock of $121,000, paid-up stock of $123,000, deposits of $830,000, borrowed money $20,000, and a reserve fund of $18,500. Stockholders numbered 301 and borrowers 495, of whom only two were stockholders. It had 2,239 savings depositors. The deposits from nonmembers were evidenced by entries in books "such as are ordinarily used by savings banks." About 80 per cent of its receipts and 97 per cent of its loans were transactions with nonmembers.

A statement of the essential facts connected with the operation of plaintiff company will readily demonstrate the inapplicability of the decision in the Lilley case to the facts in the present case.

In the year 1918 forty mortgage loans were made to members and thirty-nine to nonmembers; in 1919, one hundred and fifty-eight to members and forty-seven to nonmembers; in 1920, one hundred and forty-three to members and seventy to nonmembers; in 1921, one hundred and seventy-seven to members and thirty to nonmembers; in 1922, one hundred and seventy five to members and ten to nonmembers; in 1923, two hundred and sixty two to members and one to nonmembers. Through the entire period 1918 to 1923, inclusive, nine hundred and fifty-five mortgage loans were made to members and one hundred and ninety-seven to nonmembers, the loans to members being more than 82 per cent of the total number of loans. In the Lilley case out of a total of 495 loans only two, or four-tenths of one per cent, were members or shareholders.

For the period from 1918 to 1923, inclusive, the total amount of loans was $2,271,604.40. Of this amount $1,488,294.28 was loaned to members and $783,310.12 to nonmembers. While the ratio varied from year to year, the percentage for the whole period was 66 per cent to members and 34 per cent to nonmembers.

The net profits of plaintiff company for each year, after providing for expense of operation and the reserve required under the law of the State of Ohio, were distributed semiannually, to members only, in dividends at the rate of 5.7 per cent for the year. The principal source of the earnings of the company was interest. It deposited surplus funds with other building and loan associations
from which it derived interest at the rate of 6 per cent, and
23 such deposits could be withdrawn at any time, and the earnings from these transactions likewise accrued to the benefit only of the members. It received deposits from nonmembers, evidenced by certificates of deposit or by pass books such as are in common use by building and loan associations. It paid interest on such deposits at the rate of 3 per cent, 4 per cent, and 5 per cent,

determined by the length of time for which the deposit was allowed to be retained. Such deposits constituted a portion of the fund from which loans were made at the established legal rate, and the benefit from these transactions likewise accrued to the members alone. It deposited a part of its surplus funds in other building and loan associations. We fail to see the objection to this occasional practice, as it derived an advantageous return from such deposits which accrued also to the benefit only of members; and inasmuch as these deposits could be withdrawn at any time it enabled plaintiff to carry a smaller banking balance. In making loans to nonmembers the borrowing needs of members were never neglected. So far as the record discloses, plaintiff was at all times in a position to supply the borrowing needs of its members, and at no time was a borrowing nonmember preferred over a member. A comparison of the receipts from members with the receipts or deposits from nonmembers can not be shown on account of the unsatisfactory state of the record, which seems to set forth as to this item only net balances at the end of the year. However, under our view of the whole case this information would not have a controlling influence in determining the rights of the parties.

It should be observed that in each of the acts dealing with the subject under consideration Congress has merely provided for the exemption from Federal taxation of "domestic building and loan associations" without attempting to define or describe such associations. The limitation in the 1909 act received the disapproval of Congress when it authorized and directed the taxes which had been collected under said act to be refunded, referring to same as taxes "illegally collected * * *" Inasmuch as Congress, during the period from 1909 to 1921, has deemed it proper to impose no limitation or restriction upon the exemption from taxes of building and loan associations, neither in express terms nor by defining a building and loan association, unquestionably the court is without authority to do so. In enacting these various statutes Congress was legislating with reference to building and loan associations existing and operating at the time under the various State laws. It was dealing for taxation purposes with a creature of the State, controlled and regulated by the State under its general police power. The law of the State in which they were created was the only law which described or defined a building and loan association, and Congress was chargeable with a knowledge of that law. Until the enactment of the 1921 act Congress accepted these associations as they existed and were operated in the different States; and it will be noted that in the 1921 act there was still no evident purpose of imposing any restriction upon the methods of operation further than to confine the benefits of the statute to those associations making loans substantially to members. If Congress had desired to do so it could have further restricted the exemption and limited it not only to making loans to members but also to the acceptance of deposits only from members

or to the requirement that the amount of the loan should
24 be measured by the amount of the subscription to stock and many other things complained of by the Government; but it has not thus far done so. In the absence of such legislation it is not within the authority of the court to extend or restrict the provisions of the statute. Its proper function is to construe and apply the law as it is written.

There is appended hereto as a footnote[1] a compilation of the sections of the Ohio code containing the grant of authority by the State for the operation of building and loan associations in that State. Operating under that authority and grant of powers plaintiff company has, since the year 1891, submitted an annual report to the

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[1] OHIO CODE.

Sec. 9643. *Interpretation of terms.*—A corporation for the purpose of raising money to be loaned to its members and others shall be known in this chapter and in the laws relating to the department of building and loan associations as a "building and loan association," or as a "saving association." * * *

Sec. 9644. *Receiving of deposits; trust accounts.*—To receive money on deposits, and all persons, firms, corporations and courts, their agents, officers and appointees may make such deposits and such deposits, but such corporation shall not pay interest thereon exceeding the legal rate. * * *

Sec. 9652. *Withdrawal of deposits.*—To permit withdrawal of deposits upon such terms and conditions as the association provides except by check or draft. But no such association shall be permitted to carry for any member or depositor any demand, commercial or checking account. Nothing in this chapter shall prevent members or depositors from withdrawing funds by nonnegotiable orders.

Sec. 9653. *Cancellation.*—To cancel shares and parts of shares of stock upon which the credits have been withdrawn, or upon which loans have been repaid, and release them as now stock.

Sec. 9655. *Property, leasing, holding of.*—To lease, acquire, hold, encumber, convey and rent such real estate and personal property as is necessary for the transaction of its business, or necessary to collect or protect its securities.

Sec. 9656. *Borrowing money.*—To borrow money, not exceeding twenty per cent of the assets, and issue its evidence of indebtedness or other security therefor.

Sec. 9657. *Loans; enumeration of securities.*—To make loans to members and others on such terms and conditions as may be provided by the association and upon the following securities only:

First. Obligations secured by mortgage or deed of trust on real estate or any leasehold estate therein, which mortgages or deeds of trust may be made direct to the association or they may be made to third persons or corporations and pledged by them to the association as collateral. Such obligations shall be the first liens on real estate or any leasehold estate therein, but additional loans may be made where the association holds all prior mortgage liens. Nothing herein, however, shall prevent an association organized under this act from accepting additional security other than that herein provided where the primary and principal security is a first mortgage or deed of trust on real estate or any leasehold estate therein.

Second. Obligations secured by pledge of stock in or of deposits in such association, but such loans shall not exceed either the paid up value or the withdrawal value of such stock or deposits.

Third. Obligations secured by pledge of any of the securities provided for in section 9690 of the General Code, not to exceed, however, ten per cent of the assets of the association.

Fourth. Building and loan companies that have been making loans primarily on other securities than those named in the above sections continuously since January 1, 1913, are authorized to continue the loaning on such securities.

Sec. 9660. *Investment of idle funds up to 20 per cent.*—To invest any of its idle funds, or any part thereof, in bonds or interest bearing obligations of the United States, or of the District of Columbia, or of the State of Ohio, or of any county, township, school district, or other political division in the State of Ohio, or of any incorporated city or village in the State of Ohio, or in farm loan bonds issued under the provisions of the act of Congress known as the Federal farm loan act approved July 17, 1916, and amendments thereto; and in such other securities as now are, or hereafter may be accepted by the United States to secure Government deposits in national banks. But such investments at no time shall amount in the aggregate to more than twenty per cent of the assets of such corporation.

Sec. 9662. *Consent of superintendent to sell, etc.*—To buy but not to sell, convey with the written consent previously granted by the superintendent of building and loan associations, interest bearing obligations secured by real estate mortgages which shall in all respects comply with and be within the rules adopted for making mortgage loans by the corporation making such investments. Such mortgage investments may be held and reported as mortgage loans.

Sec. 9663. *Distribution of earnings.*—To make such annual or semiannual distribution of the earnings as is hereinafter provided, and as the constitution and by-laws may prescribe.

superintendent of building and loan associations as required by law, and has received a certificate each year to the effect that it had complied with the Ohio laws relating to the conduct of its business as a building and loan association. It should be stated in this connection that during the years in question here only one objection was made by the State authorities to the methods employed by plaintiff in the operation of its business, and that had reference to a $5,000 hotel bond acquired by plaintiff as an investment. The situation was corrected in accordance with the requirement of the superintendent of building and loan associations.

It will be noted that plaintiff company was authorized to receive deposits from nonmembers and to make loans to members and nonmembers. In the decision in the Lilley case the court stated that "It is not thought that the making of loans to nonmembers, or borrowing from nonmembers, or receiving deposits to be withdrawn on demand or on time, so long as such transactions are simply incidental to the primary business of operating a mutual building and loan association, would defeat the exemption." The primary business of a building and loan association is to raise money to be loaned to its members and others.

When it is remembered that the entire benefit derived from the transactions which characterized plaintiff's business operations accrued to members alone, can it be said that those transactions resulted in the destruction or the serious impairment of the primary business of operating a building and loan association as contemplated in the taxing statutes? We think not.

During the years 1918, 1919, and 1920, and until November, 1921, plaintiff company was operating under statutes which, as stated hereinbefore, imposed no limitation whatever. No tax was collected and no tax return was required. The history of this legislation, as above outlined, together with the continuing and consistent interpretation given to those acts by the administrative officials of the Government during a period of more than twelve years, and under five successive revenue acts, if not controlling, certainly constitutes a strongly persuasive influence in a proper determination of this case. The act of 1921 exempting only such associations as confined their loans substantially to members could not affect the legal status of associations operating prior thereto and under other acts which did not even require the filing of a tax return. In attempting, after the passage of the 1921 act, to enforce the collection of taxes under prior acts the Commissioner of Internal Revenue was evidently under the impression that the exemption under the prior acts was likewise intended only for associations whose business was substantially confined to loans to members. The 1921 act is not susceptible of this construction. It was operative only upon the business of such associations after the effective date of the act. It should be stated in this connection that since the passage of the 1921 act plaintiff company has substantially complied with its provisions.

There is one other point that deserves mention. In the Lilley case the court held that the words "without capital stock organized and operated for mutual purposes and without profit" in the 1916 and 1918 acts qualified both cooperative banks and building and loan associations. The Government in this case makes the same contention, under the ruling in the Lilley case. The legislative history of the act in question easily demonstrates that such was not the intention of Congress. The House bill contained only the provision
26 for the exemption of "domestic building and loan associations." The Senate proposed an amendment providing for the exemption of "cooperative banks without capital stock organized and operated for mutual purposes and without profit * * *" The House disagreed, and the matter went to the conference committee. The explanation by the managers of the House of their agreement with the Senate is as follows: "The Senate amendment provides that the income of cooperative banks organized and operated for mutual purposes and without profit shall be exempted from the income-tax provision. The House recedes from its disagreement to the Senate amendment, with an amendment exempting cooperative banks without capital stock organized and operated for mutual purposes and without profit." It was clearly the purpose of Congress to exempt cooperative banks as described and defined in the act in addition to building and loan associations, and in the very nature of the case the qualifying language was intended to apply only to such banks. Furthermore, it is provided in article 68 of Treasury Regulations 33, promulgated under the 1916 act under the heading "unconditional," that "Among the corporations exempt from tax, without condition are * * * domestic building and loan associations * * *." In the opinion of the court the construction given to the act by the court in the Lilley case and contended for by the Government in the instant case is not sound. The qualifying language was intended to apply only to cooperative banks.

The plaintiff is entitled to judgment for the amount of taxes which have not been refunded, amounting to $14,767.56, together with interest from September 18, 1924, amounting to $2,407.11, an aggregate of $17,174.67. And it is so ordered.

HAY, Judge; BOOTH, Judge; and CAMPBELL, Chief Justice, concur.

27 *Judgment*

At a Court of Claims held in the city of Washington on the 6th day of June, A. D. 1927, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do adjudge and order that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of seventeen thousand one hundred seventy-four dollars and sixty-seven cents ($17,174.67).

VI. Proceedings after judgment

On August 5, 1927, the defendant filed a motion for a new trial.

On October 17, 1927, the court entered the following order on said motion:

Order

"It is ordered by the court this 17th day of October, 1927, that the defendant's motion for new trial be and the same is overruled.

28 [Clerk's certificate to foregoing omitted in printing.]

[Indorsement on cover:] File No. 33152. Court of Claims. Term No. 700. The United States, petitioner, vs. The Cambridge Loan and Building Company. Petition for writ of certiorari and exhibit thereto. Filed January 16th, 1928. File No. 33,152.

Supreme Court of the United States

Order allowing certiorari

Filed April 9, 1928

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.